Supreme Court, U.S.
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NO. ____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOHN R. TOPP, Petitioner

v.

IDAHO STATE BAR, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

1. May a State Bar constitutionally punish a lawyer for an allegedly false statement about an elected judge's final decision in a case in which the lawyer was not counsel, without proof of actual malice?

2. May a State Bar constitutionally punish a lawyer for expressing an opinion which cannot be proven true or false that a judge's final decision in a case in which the lawyer was not counsel may have been influenced by the case's "political ramifications"?

3. Should this Court summarily reverse the decision of the Idaho Supreme Court based upon the undisputed facts and this Court's prior opinions regarding protected speech under the First Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF APPENDICES iv

TABLE OF CITATIONS v

CITATION OF CASE BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW CHILLS PROTECTED SPEECH BY PUNISHING CRITICISM OF PUBLIC OFFICIALS AND THEIR CONDUCT OF PUBLIC BUSINESS WITHOUT PROOF OF KNOWING OR RECKLESS FALSITY ON THE PART OF THE SPEAKER 8

A. THE DECISION OF THE IDAHO SUPREME COURT CONFLICTS WITH *GARRISON V. LOUISIANA*, *GENTILE V. STATE BAR* AND OTHER DECISIONS OF THIS COURT BECAUSE IT CHILLS PROTECTED POLITICAL SPEECH 8

B. THE DECISION BELOW CREATES A STANDARD OF SO-CALLED "OBJECTIVE RECKLESSNESS" THAT IS

UNCONSTITUTIONALLY VAGUE AND CREATES AN UNCONSTITUTIONAL TRAP FOR THE UNWARY 12

C. THE DECISION BELOW CONTRIBUTES TO A CONFLICT IN AUTHORITY IN THE LOWER COURTS AND CONFLICTS WITH THE ANALYSIS OF LEADING SCHOLARS.....16

D. SUMMARY 18

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING BELOW THAT A STATE AGENCY MAY PUNISH AN OPINION ABOUT A PUBLIC ACT OF AN ELECTED OFFICIAL.....18

A. THE DECISION OF THE IDAHO SUPREME COURT CONFLICTS WITH THE DECISION OF THIS COURT IN *MILKOVICH V. LORAIN JOURNAL CO.* BY ALLOWING.....18

PETITIONER TO BE PUNISHED FOR AN OPINION THAT CANNOT BE PROVEN TRUE OR FALSE ABOUT A PUBLIC ACT OF AN ELECTED JUDGE 19

B. THE DECISION BELOW CREATES A CONFLICT IN AUTHORITY IN THE LOWER COURTS ABOUT THE CONSTITUTIONAL STANDARD FOR DETERMINING WHAT STATEMENTS ARE PROTECTED FROM PUNISHMENT 26

C. SUMMARY.....28

III. CONCLUSION.....28

TABLE OF APPENDICES

Appendix A - Opinion of the Idaho Supreme Court in Idaho State Bar v. Topp, Docket No. 21760

Appendix B - Idaho Supreme Court - Order and Remittitur filed October 4, 1996

Appendix C - Idaho Supreme Court - Order Denying Petition for Rehearing filed October 4, 1996

Appendix D - Professional Conduct Board of the Idaho State Bar - Recommended Findings of Fact and Conclusions of Law

Appendix E - Stipulation to Proceed On Agreed Facts Filed With The Professional Conduct Board of the Idaho State Bar

TABLE OF CITATIONS

CONSTITUTIONAL PROVISIONS

First Amendment of the United States - 7, 9, 12, 16, 18, 20, 27
Fourteenth Amendment of the United States ------- 7, 9, 12, 20

CASES

Bridges v. California, 314 U.S. 252 ---------- 10
Chapski v. Copely Press, 92 Ill. 2d 344, 352 (1982) -------- 25
Craig v. Harney, 331 U.S. 367 ---------- 10, 11
Eisenberger v. Boardman, 302 F. Supp. 1360 (W.D. Wis. 1969) ---------- 17
Garrison v. Louisiana, 379 U.S. 64, 73-75, 79 (1964) --------- 9, 10, 11, 12, 16, 17
Gentile v. State Bar of Nevada, 111 S.Ct. 2720, 2741 (1991) 12, 15
Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970). ---------- 24
Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993) ---------- 26, 27
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) - 11, 20
Ibenez v. Florida Department of Business and Professional Regulation, 114 S.Ct. 2084, 2088 n.7 (1994) ---------- 15
In re Graham, 453 N.W.2d 313 (Minn.), cert. denied, 498 U.S. 820 (1990) ---------- 16
In re Snyder, 472 U.S. 634 (1985) ---------- 17
Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1978) ---------- 10
Matter of Westfall, 808 S.W.2d 829 (Mo.), cert. denied, U.S. (1991) ---------- 16, 17
Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) 19, 20, 22, 23, 24, 26, 27
Moldea v. New York Times Co., 22 F.3d 310, 3i5, 317 (D.C. Cir. 1994) ---------- 27
New York Times v. Sullivan, 376 U.S. 254, 280, 286-87 (1964) ---------- 9, 10, 11, 14, 15, 16, 17, 18, 19

Oklahoma Publishing Company v. District Court, 430 U.S. 308 at 311-312 (1979). ---------- 28
Pennekamp v. Florida, 328 U.S. 331, 342, 343, n. 5, 34510, 11
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 14, 20
Ramirez v. State Bar of California, 619 P.2d 399, 404 (Cal. 1980)---------- 17
Smith v. Goguen, 415 U.S. 566 (1974) ---------- 15
Speiser v. Randall, 357 U.S. 513, 525-26 (1958) ---------- 15
St. Amant v. Thompson, 390 U.S. 727 (1968)----- 9, 10, 12, 16
Standing Committee on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)----------17, 20, 25, 26
State Bar v. Semaan, 508 S.W.2d 429 (Tex.Civ.App. 1974)17
U.S. District Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993)---------- 9, 17
Washington v. Smith, 80 F.3d 555, 557 (D.C. Cir. 1996) --- 27
Weimer v. Rankin, 117 Idaho 566, 572, 790 P.2d 347, 353 (1990)----------21, 25
Wood v. Georgia, 370 U.S. 375----------10, 11

TREATISES

2 G.C. Hazard & W.W. Hodes, *The Law of Lawyering*, secs. 8.2:101, 8.2:201, p. 935 n.1.1, & pp. 933-36 (2d ed. 1996 supp. pages)---------- 17
Berg, *In re Westfall and Rule 8.2: Silence by Sanction*, 6 Geo. J. Legal Ethics 343 (1992) ---------- 17
Chapman, *Criticism -- A Lawyer's Duty or Downfall*, 1981 S. Ill. U.L.J. 437, 449 ---------- 17
Restatement 2d, Torts, sec. 566---------- 25
Wolfram, *Modern Legal Ethics*, sec. 11.3.2, pp. 603 ---16, 17

OTHER AUTHORITIES

ABA Model Rule of Professional Conduct 3.6---------- 12
Code of Professional Responsibility DR 8-102---------- 18
Model Rule of Professional Conduct 8.2---------- 18, 19, 28

CITATION OF CASE BELOW

The opinion of the Idaho Supreme Court entered on August 13, 1996, in Idaho Supreme Court Case No. 21760 is reported at 1996 WL 453286 (Idaho) and reproduced here at Appendix [hereinafter App.] 1-8. It is not yet reported in the Idaho or Pacific Reporters. On October 4, 1996 the Idaho Supreme Court entered its Order Denying Petition For Rehearing, App. C, with respect to John R. Topp's Petition For Rehearing filed on August 30, 1996. On October 4, 1996 the Idaho Supreme Court entered its Order and Remittitur adopting the opinion and ordering a public reprimand of Mr. Topp as a sanction. App. B.

JURISDICTION

The Idaho Supreme Court entered its opinion in this case on August 13, 1996. Petitioner filed a timely motion for reconsideration. The Idaho Supreme Court filed its order on the decision, and denied a petition for rehearing on October 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

First Amendment to the United States Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourteenth Amendment to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Idaho State Bar Rule of Professional Conduct 8.2(a)

"A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office."

STATEMENT OF THE CASE

On October 4, 1993, John R. Topp, an Idaho attorney, criticized the decision of a local District Judge in a case dealing with the state procedures for large county expenditures. Topp compared the case to a similar decision in a different county and stated to a local radio station that the only difference between the cases was that the other judge "wasn't worried about the political ramifications." Based on this statement, the Idaho Supreme Court affirmed the recommendation of the Idaho State Bar's Professional Conduct Board that Topp be professionally disciplined.

This matter comes before the Court for review of a judgment by the Idaho Supreme Court rendered in a case submitted to it on stipulated facts. Idaho S.Ct. No. 21760, Opinion and Order dated August 13, 1996, rehearing denied, October 4, 1996, App. A, B, C. The Supreme Court imposed the sanction of a public reprimand on attorney John R. Topp (Petitioner) for allegedly violating Idaho Rule of Professional Conduct (IRPC) 8.2(a), which restrains statements by lawyers which are derogatory of judges and other legal officials. The Court punished Petitioner as a result of a statement of opinion attributed to him in a radio broadcast of October 4, 1993.

The radio broadcast attributed statements to Petitioner concerning the final decision of an elected state court judge, the Hon. James Michaud, in a case involving a highly publicized political issue--whether the Bonner County Commissioners could authorize a $4.1 million expenditure for solid waste disposal by themselves or must submit the expenditure to the county's voters. On October 4, 1993, immediately after oral argument in the case (called a "judicial confirmation" in Idaho law), Judge Michaud had orally ruled against the County Commissioners. Judge Michaud released a written transcript of the ruling "within minutes of the decision." Opinion of the Court, Trout, J., Idaho. S. Ct. No.

21760, App. A2. Mr. Topp was not attorney of record in this case, though he represented Bonner County in other cases. *Id.*

Shortly before this judicial confirmation case, another Idaho District Judge, the Hon. Craig Kosonen, of Shoshone County, "in a similar case . . . reached a different decision." *Id.*, App. A8. Under Idaho law, the position of District Judge, held by Judges Michaud and Kosonen, is an elective office. Idaho Const. Art V, §11.

The finding of the Idaho Supreme Court concerning the content of the radio report follows:

> "The transcript of the radio report states: 'County attorney John Topp is critical of [Judge Michaud's] ruling. District Judge Craig Kosonen recently granted a similar petition by Shoshone County . . . Topp says there's no difference between the 2-cases, except Judge Kosonen . . . quoting directly . . . "wasn't worried about the political ramifications.'"[1]

App. A5. Petitioner was also alleged to have made similar comments to a newspaper reporter, but the Idaho Supreme Court did not rely on them in imposing his punishment.

On March 22, 1994, the Idaho State Bar (Respondent) filed (and later amended) a complaint against attorney John R. Topp with its Professional Conduct Board alleging a violation of Idaho Rule of Professional Conduct 8.2(a) (modeled upon Model Rule of Professional Conduct 8.2).

On August 30, 1994, Petitioner filed a motion to dismiss or for summary judgment in the proceeding on the grounds that the complaint did not state a cause of action and that the remarks attributed to him were protected by the First

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[1] Dots in radio transcript quotation are in the original, and following radio script conventions, do not indicate omissions of matter that was broadcast.

Amendment of the United States Constitution. In the Memorandum supporting the motion, Topp raised both the issue of the proper constitutional definitions of "malice" and "opinion." Memorandum in Support of Motion for Rule 12(b) Dismissal and Summary Judgment, 20-21 (opinion), 29-31 (malice), Record in Idaho S.Ct. Case No. 21760 [hereinafter Record] 53-54, 62-63. Following oral argument on these motions, the parties submitted the case to a Hearing Committee of the Professional Conduct Board of the Idaho State Bar, without an evidentiary hearing, on the basis of depositions and a written stipulation of agreed facts, including the following concerning the events surrounding the decision of Judge Michaud and the radio broadcast:

> "That a "political frenzy" concerning property taxation issues was occurring in Bonner County in and around the time of the judicial confirmation proceeding, and that Judge Michaud was aware of that political frenzy.
>
> "That recall petitions, initiated by citizens raising property tax issues, targeting a number elected county officials (not Judge Michaud) had been filed prior to the time of the judicial confirmation proceeding. Additionally, a petition bearing 6,000 signatures and seeking a property tax rollback had been filed prior to the time of the judicial confirmation proceeding. Judge Michaud was aware of both filings prior to ruling on the judicial confirmation proceeding."

App. E2. Petitioner and Respondent stipulated that Judge Michaud would testify that his decision was not politically influenced, but specifically did not stipulate to the truth of that expected testimony. App. E1.

The Hearing Committee of the Professional Conduct Board ruled against Petitioner, both on his motions and on the merits of the case. It found that he violated Rule 8.2 by

making a reckless statement concerning a judge's motivation in deciding a highly political case, and recommended the imposition of a public reprimand. Recommended Findings of Fact and Conclusions of Law, App. D. The Hearing Committee did not find that the statement attributed to petitioner was false, but instead correctly noted, "the implication of political motivation could not be proved or disproved." App. D4.

Petitioner sought appropriate review by the Idaho Supreme Court. He again raised the issues of the appropriate constitutional definitions of "malice" and "opinion." Brief for Defendant-Petitioner in Idaho S.Ct. Case No. 21760, 7-9 (opinion), 9-13 (malice). The Idaho Supreme Court rejected Petitioner's arguments in its opinion, App. A, and entered its order imposing the sanction of a public reprimand against Topp.

The Supreme Court found that Petitioner had implied that Judge Michaud's decision was politically motivated. It also decided that this statement was false as a matter of fact, solely because Judge Michaud would have so testified. App. A7.

The Idaho Supreme Court, properly, also found "there is no contention that Topp had actual knowledge that his statement was false." The Court also found that Petitioner's statement was based upon the following assertions:

> "(1) there was a political frenzy in Bonner County with regard to property tax issues; (2) the immediate release of the [written] decision [after oral argument] could lend support to an inference that the case was decided prior to argument and that Judge Michaud was concerned with disseminating that decision to the public quickly; and (3) another district judge in a similar case had reached a different decision."

App. A8. The Idaho Supreme Court did not find any of these

assertions to be false, nor did it find that Petitioner was in possession of any facts which did, or should have given him reason to doubt the alleged conclusion that Judge Michaud was politically influenced. It simply went on to state, without referring to any evidence of falsity or Petitioner's knowledge of possible falsity, "a reasonable attorney, in considering these facts, would not have made the statement in question." App. A8.

On October 4, 1996, the Idaho Supreme Court denied Petitioner's timely Petition for Rehearing. App 10.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the decision of the Idaho Supreme Court violates Petitioner's right to freedom of speech under the First Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment.

First, the decision below violates the First Amendment because it punishes discussion of the public acts of elected public officials without proof Petitioner in fact entertained serious doubts as to the truth of his statements as required by *St. Amant v. Thompson*, 390 U.S. at 731. The decision below ignores this requirement, and creates a new standard of so-called "objective recklessness" for determining what speech by a lawyer is malicious, and therefore punishable. Not only does this so-called standard repudiate the express and unambiguous teaching of *St. Amant v. Thompson*, see *infra* at p. 9, but such a standard would be unconstitutionally vague, because a lawyer could not determine before speaking what factors would be considered in determining whether the speech is punishable. In short, the decision unconstitutionally chills speech that is at the core of First Amendment protections. Additionally, the decision below contributes to a conflict in authority among the lower courts

on what definitions of malice may constitutionally be used to punish lawyers accused of making false statements about judges.

Second, the decision below violates the First Amendment because it punishes Petitioner for making a statement of opinion about a public act of an elected official. Petitioner's opinion cannot be proven true or false, and is thus protected from punishment by the Constitution. The decision below also creates a conflict in authority among the lower courts about what statements of opinion are protected from punishment by the First Amendment.

Finally, if this Court does not grant certiorari and reverse the decision below, no Idaho attorney will be able to engage in public criticism or discussion of the state's elected judiciary without fear of punishment.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW CHILLS PROTECTED SPEECH BY PUNISHING CRITICISM OF PUBLIC OFFICIALS AND THEIR CONDUCT OF PUBLIC BUSINESS WITHOUT PROOF OF KNOWING OR RECKLESS FALSITY ON THE PART OF THE SPEAKER

A. THE DECISION OF THE IDAHO SUPREME COURT CONFLICTS WITH *GARRISON V. LOUISIANA*, *GENTILE V. STATE BAR* AND OTHER DECISIONS OF THIS COURT BECAUSE IT CHILLS PROTECTED POLITICAL SPEECH

The Idaho Supreme Court held that Respondent, the Idaho State Bar, need not prove "actual malice" (i.e., knowing or reckless falsity) before punishing Petitioner John Topp for allegedly making statements about the public acts of an

elected judge in an already decided case in which Mr. Topp was not counsel. Certiorari should be granted because this contradicts the clear holdings of *Garrison v. Louisiana*, 379 U.S. 64, 73-75, 79 (1964), *St. Amant v. Thompson*, 390 U.S. 727 (1968), and *New York Times v. Sullivan*, 376 U.S. 254, 280, 286-87 (1964), that one may not be punished for statements concerning the act of a public official in the conduct of public business in the absence of actual malice.

The Idaho Supreme Court instead held that the State Bar may punish a statement that is not " . . . 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.'" App. A7, quoting from *U.S. District Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993). This Court should review the decision of the Idaho Supreme Court because its standard for punishing political speech by uninvolved lawyers commenting on decided cases is inconsistent with the First and Fourteenth Amendments to the United States Constitution as applied by the Court:

> "The great principles of the Constitution which secure freedom of expression in this area [criticism . . . of public officials and their conduct of public business] *preclude attaching adverse consequences to any except the knowing or reckless falsehood.*"

Garrison v. Louisiana, 379 U.S. at 73 (bracketed matter from 379 U.S. at 72-73) (emphasis added). This Court has explained:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

St. Amant v. Thompson, 390 U.S. at 731; accord *Garrison*, 379 U.S. at 74, 79. The standard of the Idaho Supreme Court allowed Petitioner to be punished for his alleged comment on the act of a public official--an elected judge--in the conduct of public business--the decision whether or not to require a proposed county expenditure to go to a referendum of the people, without proof that the statement was a knowing or reckless falsehood.

The purposes for the "actual malice" rule apply to comments related to official conduct of judges as much as to other speech relating to government acts:

> Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California*, 314 U.S. 252. This is true even though the utterance contains "half-truths" and "misinformation." *Pennekamp v. Florida*, 328 U.S. 331, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also *Craig v. Harney*, 331 U.S. 367; *Wood v. Georgia*, 370 U.S. 375. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," *Craig v. Harney*, *supra*, 331 U.S. at 376, surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism, and hence diminishes their official reputations.

New York Times v. Sullivan, 376 U.S. 254, 273 (1964). The strict rule protecting criticism of judges outside the courtroom has been followed in numerous cases. E.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (invalidating sanction against newspaper for publishing article about confidential judicial review

proceeding).

In deciding *Garrison*, this Court reversed a lawyer's conviction for criminal libel for calling judges "racketeer influenced" in cases in which he *was* counsel. This Court's holding was clear: the government may not attach "adverse consequences" to a statement about public acts of public officials in the absence of "knowing or reckless falsehood." 379 U.S. at 73, 79. The type of action, such as criminal libel, civil defamation, or infliction of emotional distress, does not matter. *Id;* accord *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (action for infliction of emotional distress requires "knowing or reckless falsehood"). In plain language, the disciplinary punishment recommended by the Idaho State Bar and imposed by the Idaho Supreme Court is an "adverse consequence." Yet the Supreme Court of Idaho is attaching it to Petitioner because of statements which were *not* knowingly or recklessly false.

No cases of this Court suggest that the standard of culpability for punishment of false statements may be different for lawyers and non-lawyers. Cf. *Garrison v. Louisiana*, *supra* ("actual malice standard" applies to a lawyer accused of criminal contempt). The only way in which this Court's recent decisions differentiate between that First Amendment protection of speech of lawyers and non-lawyers concerns the amount of danger to the administration of justice required before restrictions can be placed upon speakers. This Court has held that, where courts are involved, government can generally repress political speech by citizens only given "a clear and present danger of the obstruction of justice"--not simply because it wants to protect the dignity of judges. *New York Times v. Sullivan* at 272-73, relying upon *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Wood v. Georgia*, 370 U.S. 375 (1962) (three cases involving non-lawyers). Only where lawyers are involved in pending cases (*not* the case here), has

this court announced a slightly less stringent standard, allowing regulation or prohibition of speech presenting "'a reasonable likelihood of prejudicing a fair trial' . . .." *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2741 (1991) (opinion of Chief Justice Rehnquist, speaking for the Court on this point).

The need to prevent prejudice of jurors in pending proceedings is the basis of ABA Model Rule of Professional Conduct 3.6 (similar to Idaho Rule of Professional Conduct 3.6, not involved in this case). The Idaho Supreme Court very properly made no finding of a clear and present danger--or even reasonable likelihood--of obstruction of justice on the record before it. The case on which Petitioner commented was a non-jury matter that Judge Michaud had already decided.

As the cases discussed above demonstrate, the First Amendment, applied to the States through the Fourteenth, has by its nature rejected the idea that covering up potential problems protects the "integrity" of the judicial system. Our Constitution is founded on the principle that forthright exposure of potential problems insures the integrity of the courts, as well as the other organs of government.

B. THE DECISION BELOW CREATES A STANDARD OF SO-CALLED "OBJECTIVE RECKLESSNESS" THAT IS UNCONSTITUTIONALLY VAGUE AND CREATES AN UNCONSTITUTIONAL TRAP FOR THE UNWARY

The standard announced by the Idaho Supreme Court goes beyond rejecting the standard of recklessness defined by *St. Amant* and *Garrison*. The Idaho ruling does not even require negligence concerning truth or falsity. It does not protect speech about the public acts of public officials that an attorney reasonably believes is true. The face of the standard also requires the attorney to determine whether "in light of all

his [or her] professional functions" a reasonable attorney would have made the statements. Some of the factors which might go into this extremely vague standard might be whether the reasonable attorney believed that the circumstances reported in the press warranted the inference drawn; whether that attorney felt restrained by a sense of social decency (as suggested by the dissent below—App. A9) to not express an opinion, whatever the likelihood that the opinion was correct; whether the criticism would be popularly understood correctly; the constitution of the audience; and so forth.

That these factors, and not merely reasonable belief in truth, are included in this standard, is apparent from the statement of the Idaho Supreme Court that "the question is whether Topp was 'objectively reckless' in making that statement to the media," App. A8, and its subsequent application. The Court does not find that the reasons Topp believed his statement was true made his belief unreasonable. Indeed, the Idaho Supreme Court opinion only cites evidence that supports the reasonableness of Petitioner's implication that the judge may have been politically influenced:

> "(1) there was a political frenzy in Bonner County with regard to property tax issues; (2) the immediate release of the [written] decision [after oral argument] could lend support to an inference that the case was decided prior to argument and that Judge Michaud was concerned with disseminating that decision to the public quickly; and (3) another district judge in a similar case had reached a different decision."

App. A8. Properly, the Idaho Supreme Court does not state that any of the circumstances Topp relied on in reaching his conclusion were false. The Idaho Supreme Court does not point to any evidence that Petitioner was aware of which should have alerted him to the fact that his opinion was

"false". Significantly, the Idaho Supreme Court does not conclude that the inference Topp drew from the undisputed facts was illogical. The challenged opinion merely states:

> "We conclude that a reasonable attorney, in considering these facts, would not have made the statement in question. Because Topp's statement necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations, it impugned his integrity. Therefore we hold that the ISB established a violation of I.R.C.P. 8.2(a) and that a public reprimand is the appropriate sanction for that violation."

App. A8. In other words, the Idaho Supreme Court's decision amounts to a holding that no reasonable attorney would impugn the integrity of a judge based on circumstantial evidence of his motivation, and, therefore, the expression of such an opinion is not protected by the First Amendment. The consequence of the Idaho definition of what speech may be punished will inevitably be the chilling of constitutionally protected--and needed--speech about the functioning of one of the three great branches of government.[2]

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[2] One subsidiary issue fairly included in the question of defining malice is whether the burden of disproving recklessness, either "subjective" or "objective," may constitutionally be placed on the defendant. The Idaho Supreme Court appears to do so, because its opinion, as mentioned above, only states the evidence for non-recklessness, states no evidence supporting recklessness, even under its "objective" definition, but finds Petitioner to have spoken "objectively" recklessly. Yet this Court's cases clearly indicate that the burden of making out the entire cause of action for false speech in the context of matters of public interest must be on the plaintiff. Cf. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (burden of proof of falsity must be placed upon even private defamation plaintiff as against media defendant); *New York Times v. Sullivan*, 376 U.S. at 279 (burden of showing falsity and malice must be on defamation plaintiff who is public official). More generally, this

The chilling effect of an "objective recklessness" standard is demonstrated by the Professional Conduct Board of the Idaho State Bar Recommended Findings of Fact and Conclusions of Law. App. D. The Board relied on matters unrelated to the likelihood of a statement being true in determining whether Petitioner's statements would have been made by a "reasonable attorney". One reason that it found Petitioner "reckless" was that he "knew or should have known that his statements would be published in the press." App. D4. The Professional Conduct Board's statement that "Attorneys in the state of Idaho have a *nonpublic forum* to register complaints against judges through the Judicial Council." *id.* at 6, Record 247 (emphasis added) demonstrates that its decision is designed to take debate over qualifications of elected judges out of the public arena. The chilling effect of this logic is palpable. The intent of the Professional Conduct Board to chill public speech is express.

In short, the factors that can go into a Bar or Court analysis of what the "reasonable attorney" would do in light of a lawyer's professional responsibility are almost wholly unpredictable. This creates the sort of "trap for the unwary" condemned in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2741 (1991). This sort of vagueness is impermissible in regulation of activities protected by the First Amendment. See, e.g., *id.*; *Smith v. Goguen*, 415 U.S. 566 (1974). Importantly, vagueness of this kind serves no conceivable

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Court has developed a principle that where the government seeks to punish a citizen for unlawful speech, the burden must be on the government to show its unlawful character. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958), relied upon in *New York Times v. Sullivan*, supra; cf. *Ibenez v. Florida Department of Business and Professional Regulation*, 114 S.Ct. 2084, 2088 n.7 (1994) (government agency bears burden of justifying restriction even of commercial speech). The importance of the issue of burden of proof of malice alone would justify granting certiorari in this case.

legitimate interest of the Idaho State Bar, whose interests are best served when its rules clearly advise members of their obligations.

The only reason stated by the Supreme Court of Idaho for rejecting the *New York Times* rule requiring reckless falsity--"the State's legitimate interest in preserving the integrity of its judicial system," App. A7--simply is not sufficient to change the standard of culpability required before statements by uninvolved lawyers can be punished. The integrity of a judicial system is not preserved when those most likely to know its flaws--the lawyers who work in it--are discouraged from exposing them for fear that they will be sanctioned if they cannot prove that a hypothetical "reasonable lawyer" would also have acted to expose them.

C. THE DECISION BELOW CONTRIBUTES TO A CONFLICT IN AUTHORITY IN THE LOWER COURTS AND CONFLICTS WITH THE ANALYSIS OF LEADING SCHOLARS

This Court also needs to grant certiorari because there is a conflict of authority in the lower courts about whether the requirement of "knowing or reckless falsehood" of *Garrison*, *St. Amant*, and *New York Times* applies in the bar disciplinary context. In the lower courts, "a disturbing number of decisions show open judicial hostility toward claims of First Amendment protection for strongly worded lawyer criticism of judges." Wolfram, *Modern Legal Ethics*, sec. 11.3.2, pp. 603. The Idaho Supreme Court is not alone in allowing bar discipline for statements concerning the public acts of judges to be imposed if a "reasonable attorney, considered in light of all of his professional functions" would not have made the statements. See, e.g., *Matter of Westfall*, 808 S.W.2d 829 (Mo.), *cert. denied*, U.S. (1991); *In re Graham*, 453 N.W.2d 313 (Minn.), *cert. denied*, 498 U.S. 820 (1990).

Other courts have said they were applying this standard, but have applied it in a way that makes it approximate a true *New York Times-Garrison* malice test. See, e.g., *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), revising the rule of *United States District Court v. Sandlin* 12 F.3d 861 (9th Cir. 1993). Still other courts have properly taken this Court at its word, and set forth rules allowing imposition of penalties only for knowing or reckless falsehood. See, e.g., *Ramirez v. State Bar of California*, 619 P.2d 399, 404 (Cal. 1980) (relying on *Garrison*); *Eisenberger v. Boardman*, 302 F. Supp. 1360 (W.D. Wis. 1969); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex.Civ.App. 1974).

The most prominent scholarly commentary on the Model Code of Professional Responsibility finds the "reasonable attorney" standard set forth in *Westfall* "very troubling indeed." 2 G.C. Hazard & W.W. Hodes, *The Law of Lawyering*, secs. 8.2:101, 8.2:201, p. 935 n.1.1, & pp. 933-36 (2d ed. 1996 supp. pages), relying upon *In re Snyder*, 472 U.S. 634 (1985); accord, C.W. Wolfram, *Modern Legal Ethics*, sec. 11.3.2, pp. 601-03 (1986); see also Berg, *In re Westfall and Rule 8.2: Silence by Sanction*, 6 Geo. J. Legal Ethics 343 (1992); Chapman, *Criticism -- A Lawyer's Duty or Downfall*, 1981 S. Ill. U.L.J. 437, 449. Hazard and Hodes argue that for constitutional purposes:

> "Plainly an uninvolved lawyer (such as a law professor or television commentator) who attacks a judge or a court decision in a public forum should not be subject to more restrictions than an ordinary citizen, merely because she happens to be a lawyer. In such situations, recklessly false statements of fact may still be punished . . .."

Hazard and Hodes, *supra* sec. 8.2:201, p. 934.

The case at bar, and the others invoking the "reasonable attorney, considered in light of all his professional duties" standard, are a recent aberration in the post-*New York Times*

period. From the date of *New York Times* until recently, the primary disciplinary standard for statements about judges was knowing falsity. Code of Professional Responsibility DR 8-102 (prohibiting "knowingly . . . false statements of fact" about judicial candidates' qualifications and "knowingly . . . false accusations" against judges). This standard clearly meets the *New York Times* guideline for constitutionality. The newer Model Rule of Professional Conduct is in fact couched in the language of *New York Times*, and intended to implement its rule. Model Rule of Professional Conduct 8.2 (prohibiting making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity"). Nonetheless, the language of this new Model Code has been interpreted by the Idaho Supreme Court and a few others to give rise to this new, so-called "objective" standard, which cannot be squared with the great purposes of the First Amendment.

D. SUMMARY

American democracy is based upon "a profound national commitment to the principle that public debate should be uninhibited, vigorous and wide-open . . .." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). To ensure that commitment is honored, this Court should grant certiorari and reverse the decision of the Idaho Supreme Court.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING BELOW THAT A STATE AGENCY MAY PUNISH AN OPINION ABOUT A PUBLIC ACT OF AN ELECTED OFFICIAL

A. THE DECISION OF THE IDAHO SUPREME COURT CONFLICTS WITH THE DECISION OF THIS COURT IN *MILKOVICH V. LORAIN JOURNAL CO.* BY ALLOWING

PETITIONER TO BE PUNISHED FOR AN OPINION THAT CANNOT BE PROVEN TRUE OR FALSE ABOUT A PUBLIC ACT OF AN ELECTED JUDGE

This Court should grant certiorari because the Idaho Supreme Court punished Petitioner for stating a political opinion concerning a public act of a public official holding an elective office -- Hon. James Michaud. It held that the Petitioner should be punished for a quote attributed to him in a radio report. The report said that, there was no difference between two recently decided cases, concerning whether certain types of proposed county expenditures must be submitted to voters, "except Judge Kosonen [who had decided the similar case in another county]. . . quoting directly [from Petitioner] . . . 'wasn't worried about the political ramifications.'" App. A5.[3]

The Idaho Supreme Court's analysis of why this is punishable is not limited to professional disciplinary proceedings. Thus, this decision will chill expression of political opinion about judicial performance by the press and citizenry, as well as lawyers. It is thus imperative that this Court grant certiorari, as it often has in free expression cases, to review the application of legal standards to facts to ensure that constitutionally protected speech is not suppressed or punished. E.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990), relying on *New York Times v. Sullivan*, *supra*.

Petitioner's statement cannot be punished because it expresses the speaker's political view, which cannot be proven true or false, concerning disparate judicial decisions. As the Hearing Committee of the Professional Conduct Board of the Idaho State Bar correctly noted, "the implication

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[3] Petitioner was also quoted in a newspaper article, but because of disagreement about what he stated to the newspaper reporter, the Idaho Supreme Court did not rely on this quote in finding that he had violated IRPC 8.2.

of political motivation could not be proved or disproved." App. D4, R.246. As Justice Schroeder of the Idaho Supreme Court pointed out in his dissent, "a reader or listener with common sense would understand that the comments [of Petitioner] were statements of opinion." App. A10.

Penalizing this type of opinion cannot be squared with the First and Fourteenth Amendments as interpreted by this Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. at 19-20. In *Milkovich*, this Court held that "a statement on matters of public concern must be provable as true or false" before it can be sanctioned under state libel law. *Id.* at 19, relying upon *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986). However, neither this Court, nor the Idaho Supreme Court, has articulated a reason for allowing bar disciplinary punishment for opinions which cannot be proven true or false. *Milkovich* implied that the type of punishment for such a statement would not matter:

> "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive *full constitutional protection.*"

497 U.S. at 20 (emphasis added). See also *id.* (statements that cannot reasonably be interpreted as stating actual facts are "protected"), relying upon, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (action for emotional distress).[4]

The Idaho Supreme Court's reasoning that Petitioner's statement contained an implication of "fact" is tortured. The Idaho Supreme Court does not deny that the statement attributed to Petitioner is a political opinion. Instead it holds:

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[4] If the Opinion of the Idaho Supreme Court were read to create a different standard for determining what is an "opinion" in bar disciplinary cases, certiorari should be granted to resolve a conflict with *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995), which applies the *Milkovich* standard of provable truth or falsity.

> "'[t]he important consideration is not whether the particular statement fits into one category or another [fact or opinion], but whether the particular article provided sufficient information upon which the reader could make an independent judgment for himself.' . . . Thus, even statements which appear to be opinion will nonetheless be treated, for constitutional purposes, as assertions of fact if the speaker implies that he is privy to undisclosed facts and that he has 'private, first-hand knowledge which substantiate[s] the assertions made.'"

App. A4, quoting from *Weimer v. Rankin*, 117 Idaho 566, 572, 790 P.2d 347, 353 (1990). It then goes on to hold Petitioner's statement subject to punishment as though it was a statement of fact because it

> "implies that Judge Michaud was worried about the political ramifications and this was the reason that his decision differed from that reached by Judge Kosonen."

App. A5. The Idaho Court says this "insinuates" that Petitioner was privy to some unrevealed facts concerning Judge Michaud's motives, and that the "audience was unable to draw its own conclusions" from those facts. App. A5. The majority's opinion does not suggest what unrevealed facts the audience would have thought Petitioner had, other than that they would concern Judge Michaud's motives. In contrast, and more realistically, Judge Schroeder in dissent observed:

> Topp could not know what was in Judge Michaud's mind or what was in Judge Kosonen's mind. Anybody reviewing Topp's comments would understand that. ... Since Topp could not know what was in Judge Michaud's mind, it was a matter of social indecency to impugn the judge's character by speculation. However, a reader or listener with common sense would understand that the comments were statements of opinion. That

> understanding of the nature of the comments as an opinion cloaks Mr. Topp in the protection afforded by the First Amendment.

App. A10. Whether or not one agrees with Judge Schroeder's characterization of the "decency" of expressing Topp's opinion, the dissent's recognition of the obvious status of Topp's statement as "opinion" for First Amendment analysis is correct. Furthermore, it demonstrates that at least one "reasonable lawyer" – Judge Schroeder – would have concluded that the statement was protected by the first amendment at the time it was uttered. Even under the vague "objective reasonableness" standard, that fact alone should be sufficient to cloak Topp with the protection of the First Amendment.

The very form of the Idaho Supreme Court's reasoning demonstrates that Petitioner's remark was protected. It was plainly a "statement of opinion relating to a matter of public concern which does not contain a provably false factual connotation." 497 U.S. at 20.

The Idaho Supreme Court had to reason back from three portions of the radio report, none of which have been alleged or proven to be false, to say that Petitioner implied a false "fact" about Judge Michaud. The first portion is not even clearly attributed in the report to Petitioner: "District Judge Craig Kosonen recently granted a similar petition by Shoshone County." The second is attributed to Petitioner as an indirect quote: "Topp says there's no difference between the two cases . . .." The third is six words quoted directly, along with an introductory phrase: "except Judge Kosonen . . . quoting directly 'wasn't worried about the political ramifications.'" All quotes from App. A5.

The characterizations of the two cases as "similar" and as having "no difference" are an interpretation of them. As the cases are matters of public record, anyone could determine

whether he or she agreed with the characterizations--and no audience in these days of "sound bite" electronic journalism would expect a detailed factual background for these characterizations to be broadcast. Most speakers also understand that, regrettably, even if they explain the factual basis for their opinions, that basis likely will not be reported.

The statement that Judge Kosonen wasn't worried about the political ramifications similarly appears to the reader clearly as an interpretation, theory, conjecture or surmise--and an unexceptionable one at that.

None of these characterizations are alleged to be false. Whether one thinks there is a difference between two cases depends on one's view of what differences are relevant. No allegation was made by Respondent or the Idaho Supreme Court that any of them is in fact false. Nonetheless, the Idaho Supreme Court infers from these characterizations that Petitioner "implies that Judge Michaud was worried about the political ramifications . . ." App. A5, and that this inference impugns Judge Michaud's integrity. There is no reason that any listener would consider this inference to be any less of an opinion than the opinions upon which it is based. Thus, the decision of the Idaho Supreme Court is in conflict with that of this Court in *Milkovich*, and this Court should grant certiorari to reverse the decision below.

Milkovich makes it clear that the mere fact that a defamatory inference may be drawn from a statement does not exempt it from First Amendment protection:

> "Next, the Bresler-Letter Carriers-Falwell line of cases provide protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. Falwell, 485 U.S. at 50. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of

our Nation. See id. at 53-55."

Milkovich v. Lorain Journal, 497 U.S. 1 (1990). Topp's statement regarding Judge Michaud's political motivation is of the character, though not as condemning, as statements this Court has declared to be protected by the First Amendment as a matter of law:

> During the course of the arguments, Bresler's opponents characterized the position he had taken in his negotiations with the city officials as "blackmail." ... It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970). For these reasons, this Court found the evidence in the record in *Bresler* to be insufficient to support a finding of actual malice as a question of law, exercising its enhanced appellate review of the entire record under First Amendment standards. Topp's comments, and this record, are of the exact same character as those held protected in *Bresler*.

Moreover, the reasoning of the Idaho Supreme Court quoted above effectively creates a constitutional standard that

requires an opinion be supported by statements of verifiable fact or be subject to punishment:

> "'[t]he important consideration is not whether the particular statement fits into one category or another [fact or opinion], but whether the particular article provided sufficient information upon which the reader could make an independent judgment for himself.'"

App. A4, quoting from *Weimer v. Rankin, supra.* That is, if there is no statement of underlying verifiable facts accompanying an opinion, any possible negative or demeaning implication may be read into it by the Court. The standard relied on to punish Petitioner ignores the fact that a statement is protected by the First Amendment if it is susceptible to an "innocent construction". See, e.g. *Chapski v. Copely Press*, 92 Ill. 2d 344, 352 (1982).

This type of rule is particularly inappropriate in the electronic age. This case involves a typical radio report in which six words of an interview between Petitioner and a reporter were excerpted on the air. Petitioner had no control over what excerpt, if any, was reported, and had no ability to control what reasons for his opinion would be given. If Petitioner had given further reasons, they probably would not have been broadcast. Many persons regularly making statements to reporters for electronic media understand this, and attempt to compress their opinions into a brief "sound bite." The "objective reasonableness" standard for affording protection under the First Amendment would impermissibly chill a broad segment of speakers.

Whether a statement sets forth underlying facts has been used in a number of cases as one consideration in deciding whether it is to be treated as protected from punishment by the First Amendment. See, e.g., *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995), relying upon Restatement 2d, Torts, sec. 566. However, no

case of this Court suggests that this can be the only factor in determining whether a statement is constitutionally protected. Such a rule would be inimical to the ability of citizens freely to make statements to reporters because the speaker has no control over which portions of the statement the reporter will provide to the public. The consideration of this issue is another reason this Court needs to grant certiorari in this case.

B. THE DECISION BELOW CREATES A CONFLICT IN AUTHORITY IN THE LOWER COURTS ABOUT THE CONSTITUTIONAL STANDARD FOR DETERMINING WHAT STATEMENTS ARE PROTECTED FROM PUNISHMENT

The decision of the Idaho Supreme Court also creates a conflict among the lower courts in determining, post-*Milkovich*, what statements are constitutionally protected opinion. For example, the Idaho Supreme Court's ruling conflicts with *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995). *Yagman* held that there is no way of proving or disproving a statement that a judge was "dishonest," because this would be heard by listeners as meaning intellectual dishonesty, which is an opinion. This analysis conflicts with the Idaho Supreme Court's assertion that a judge's concern for "political ramifications" is a fact which can be proven true or false.

The Ninth Circuit was adopting the sensible standard of the Seventh Circuit:

> "if it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993), relying upon *Milkovich*.

In *Haynes*, *supra*, the Seventh Circuit held statements that heavy drinking caused a baby's birth defects, and a statement about a man's motives for leaving his wife, were protected opinion. The *Haynes* statements appear far more like those that can be proven true or false than the statements of Petitioner.

The standard set forth by the District of Columbia Circuit for applying *Milkovich* is slightly different, but also in conflict with that of the Idaho Supreme Court. The District of Columbia Circuit has held that opinion speech about matters of public interest may be punished only if the opinion is implicitly based upon facts that are obviously untrue or the challenged statement is "so obviously false" that no reasonable person could find the characterizations were "supportable interpretations" of the underlying facts. *Washington v. Smith*, 80 F.3d 555, 557 (D.C. Cir. 1996), relying upon *Moldea v. New York Times Co.*, 22 F.3d 310, 315, 317 (D.C. Cir. 1994). In the case at bar, Petitioner's alleged opinion that Judge Michaud was influenced by "political ramifications" in deciding whether to require that a proposed county expenditure must be submitted to the voters is not necessarily derogatory. One could easily see Judge Michaud honestly and diligently paying attention in this case to one of the most important unresolved debates in American politics--the struggle for power between institutions of representative government, in this case the Bonner County Commission, and those of popular democracy, here the referendum process. However, the Idaho Supreme Court apparently read it in a derogatory way--as suggesting that Judge Michaud was concerned about what sort of decision would help get him reelected--though the Opinion never actually states this.

This conflict among the Idaho Supreme Court and three Circuit Courts of Appeal concerning how *Milkovich* should be applied to best protect the First Amendment interest in the

American tradition of open debate on matters of public interest is another important reason for granting certiorari.

C. SUMMARY

In summary, Idaho Rule of Professional Conduct 8.2 (based on the prevailing national text, the Model Rules of Professional Conduct) has now been construed to mean that a lawyer cannot express a candid and honest opinion, if a reasonable inference can mistakenly be drawn by the listener that some fact exists which is not true, and which can be read as derogatory. This can only chill needed--and constitutionally-protected--speech explaining the workings of the judicial system. Again, because the Idaho Supreme Court does not purport to limit the application of its definition of what sort of opinions are protected to lawyer disciplinary cases, its ruling will chill the speech not only of lawyers but of all citizens. For this reason, this Court should grant certiorari and reverse the decision of the Idaho Supreme Court.

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that certiorari be granted and the decision of the Idaho Supreme Court imposing a public reprimand on Petitioner for his political speech be reversed. Petitioner requests that this Court summarily reverse the Orders appealed from of the Idaho Supreme Court in light of this Court's opinion in New York Times v. Sullivan and its progeny, as is appropriate when a lower court holding abridges the First Amendment. See, *Oklahoma Publishing Company v. District Court*, 430 U.S. 308 at 311-312 (1979).

Respectfully submitted this 2nd day of January, 1997.

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Appendix A 1

In the Matter of John R. Topp, Attorney at Law.
IDAHO STATE BAR, Plaintiff-Respondent,
v.
John R. TOPP, Defendant-Petitioner.

No. 21760.
925 P.2d 1113

Supreme Court of Idaho,
Boise, April 1996 Term.

Aug. 13, 1996.

Rehearing Denied Oct. 4, 1996.

In attorney discipline proceeding, the Supreme Court, Trout, J., held that public reprimand was warranted for attorney who violated rule against making false statement concerning qualifications or integrity of a judge.

So ordered.

John R. Topp, Sandpoint; George A. Critchlow (argued), Spokane, WA, for defendant-petitioner.

Michael J. Oths, Boise, for plaintiff-respondent.

TROUT, Justice.

This is an appeal from a decision rendered by a Hearing Committee of the Professional Conduct Board of the Idaho State Bar. The Hearing Committee has recommended assessing a public reprimand against the appellant, John R. Topp, for his violation of I.R.P.C. 8.2(a).

APPENDIX A

Appendix A 2

I.
BACKGROUND

At some point prior to October, 1993, Bonner County filed a request in district court for "judicial confirmation" of a proposed $4.1 million expenditure. This money was intended to be used to close three county landfills and to construct a new transfer station to haul garbage out of state. The County hoped for a judicial declaration that this was an "ordinary and necessary" expense, thereby allowing it to raise the funds without voter approval.

On October 4, 1993, Judge Michaud heard oral argument on the judicial confirmation request. This proceeding was conducted at a time when there was a "political frenzy" and great public debate regarding property tax issues in Bonner County, including an effort to recall certain elected officials. In an oral decision rendered immediately after the close of argument, Judge Michaud denied the County's request. He also made a written transcript of the decision available to the public within minutes of the decision.

Topp, who was a part-time county attorney (but who was not involved in the confirmation proceeding) was present during the proceeding and was interviewed by members of the local media. Although the exact content of his remarks is in dispute, he at least suggested to the media that Judge Michaud's decision was motivated by political concerns. Topp's statements were included in a newspaper article and a radio news broadcast, and are the entire focus of this case.

II.
PROCEDURAL HISTORY

I.R.P.C. 8.2(a) provides in relevant part: "A lawyer shall not make a statement that the lawyer knows to be false or

with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge...." The Idaho State Bar (ISB) filed a complaint against Topp on March 22, 1994, claiming a violation of this rule. Topp filed a motion to dismiss or for summary judgment on August 30, 1994, contending that Rule 8.2(a) is violative of his rights under the First Amendment to the United States Constitution and under Idaho Const. art. 1, § 9. [FN1]

> FN1. Topp has made no argument on appeal that the Idaho Constitution provides more expansive rights than those provided by the federal constitution in this area, or that those rights have been violated.

A hearing on Topp's motion was held on October 11, 1994. During this hearing, the parties agreed that the case could be decided on stipulated facts, eliminating the need for an evidentiary hearing. On November 14, 1994, the Committee denied Topp's motion, determined that he had violated Rule 8.2(a), and recommended that he be assessed a public reprimand.

III.
STANDARD OF REVIEW

In attorney discipline cases, the burden is on the ISB to establish the alleged misconduct by clear and convincing evidence. E.g., Matter of Jenkins, 120 Idaho 379, 382-84, 816 P.2d 335, 338-40 (1991). See also I.B.C.R. 522(f). "Clear and convincing" evidence refers to "a degree of proof greater than a mere preponderance." Jenkins, 120 Idaho at 383, 816 P.2d at 339 (citing Molyneux v. Twin Falls Canal Co., 54 Idaho 619, 35 P.2d 651 (1934)). On appeal, although we give great weight to the findings of the Board, we will make an independent review of the record to determine whether the findings are supported. Id. at 383-84, 816 P.2d at 339-40.

APPENDIX A

IV.
WHETHER TOPP'S REMARKS WERE STATEMENTS OF "OPINION" PROTECTED BY THE FIRST AMENDMENT AND OUTSIDE THE SCOPE OF I.R.P.C. 8.2(a)

Statements impugning the integrity of a judge "may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they 'imply a false assertion of fact.' " Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1438 (9th Cir.1995) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 19, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1 (1990); Lewis v. Time, Inc., 710 F.2d 549, 555 (9th Cir.1983); Restatement (Second) of Torts § 566 (1977)). Topp contends that his comments to the media were merely statements of opinion which must be afforded constitutional protection.

In determining whether a statement is an assertion of fact or of constitutionally protected opinion, "[t]he important consideration ... is not whether the particular statement fits into one category or another, but whether the particular article provided sufficient information upon which the reader could make an independent judgment for himself." Wiemer v. Rankin, 117 Idaho 566, 572, 790 P.2d 347, 353 (1990) (quoting Herbert W. Titus, Statement of Fact Versus Statement of Opinion--A Spurious Dispute in Fair Comment, 15 Vand.L.Rev. 1203, 1216 (1962)). Thus, even statements which appear to be opinion will nonetheless be treated, for constitutional purposes, as assertions of fact if the speaker implies that he is privy to undisclosed facts and that he has "private, first-hand knowledge which substantiate[s] the assertions made." Id. When such statements are made, the audience is not given sufficient information upon which to form an independent judgment; therefore, the expression of

opinion is as damaging as an assertion of fact. Id. at 571-72, 790 P.2d at 352-53 (citations omitted).

In this case, there is some dispute as to exactly what was said to the media. Topp contends that he merely offered his opinion in response to a newspaper reporter's question as to whether it was possible that Judge Michaud's decision could have been politically motivated. There is testimony in the record that Topp's response was altered by the newspaper to make it appear that he "charged" that the decision was politically motivated when, in fact, he only agreed that it was possible. However, Topp does not dispute the fact that the radio news report contained a fair statement of his actual comments.

The transcript of the radio report states: "County attorney John Topp is critical of [Judge Michaud's] ruling. District Judge Craig Kosonen recently granted a similar petition by Shoshone County ... Topp says there's no difference between the 2-cases, except Judge Kosonen ... quoting directly ... 'wasn't worried about the political ramifications.' " This statement clearly implies that Judge Michaud was worried about the political ramifications and that that was the reason his decision differed from that reached by Judge Kosonen. This statement insinuates that Topp was privy to some facts about the two cases and about the motivation of Judge Kosonen in rendering his decision. Because these facts were not revealed, Topp's audience was unable to draw its own conclusions as to Judge Michaud's motivations. Therefore, even assuming the newspaper misstated what Topp said, we conclude that the comments included in the radio news report went beyond the realm of pure "opinion."

APPENDIX A

WHETHER THE COMMITTEE ERRED IN CONCLUDING THAT TOPP VIOLATED I.R.P.C. 8.2(a)

A. Framework

Topp contends that, even if his statements are not deemed constitutionally protected "opinions," they are still entitled to First Amendment protection since they were clearly political in nature. He asserts that in order to sanction an attorney under Rule 8.2(a), the statement in question must be tested under the standard articulated by the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Thus, according to Topp, the ISB must prove that the statement was false and that it was made with actual (subjective) malice, i.e., that the particular person uttering the remark did so with reckless disregard for its falsity. For the reasons set forth below, we do not agree that this is the appropriate constitutional standard to apply in this type of case.

The ISB contends that Topp should be sanctioned in order to protect the integrity of the judicial system. In First Amendment cases involving important countervailing interests, the federal courts have balanced these interests against the speaker's interests in an attempt to accommodate both. See Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (balancing the State's interest in assuring fair trials against free speech interest of attorneys). The Ninth Circuit has taken this approach in cases involving Rule 8.2(a), and we believe it is warranted here.

In United States Dist. Court v. Sandlin, 12 F.3d 861 (9th Cir.1993), a case involving application of a rule identical to I.R.P.C. 8.2(a), the court recognized the competing interests identified above. It held that, in light of the compelling state interests served by Rule 8.2(a), the rule should be read to

impose an objective malice standard on attorneys. Id. at 867. According to that court, in considering the "reckless disregard" prong of Rule 8.2(a), the standard applied is "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." Id. The Sandlin analysis was further refined in Standing Committee on Discipline v. Yagman, 55 F.3d 1430 (9th Cir.1995), where the court identified the additional requirement that the disciplinary body establish that the attorney's statements were false. Id. at 1438. This formulation strikes a reasonable balance between the right of free speech and the State's legitimate interest in preserving the integrity of its judicial system. The speaker's interest is accommodated by the requirement that the State prove the statement was false and that the speaker lacked a reasonable basis for the statement. The State's interest is accommodated by the fact that it need not prove subjective malice.

B. Application

We conclude that the ISB has established, for purposes of this case, that Topp's statements as to Judge Michaud's motivations were false. [FN2] The parties stipulated that Judge Michaud would testify that his decision in the judicial confirmation proceeding was not politically motivated. Although Topp makes much of the fact that the parties did not stipulate to the truth of this testimony, we are aware of no requirement that parties must stipulate to the truth of evidence in the record before a court may consider that evidence. The stipulated testimony of Judge Michaud is not controverted, and the parties' failure to stipulate as to the truth of that evidence is irrelevant.

> FN2. Even though the ISB concedes that actual falsity is an essential element of its case, it failed to allege in its complaint that Topp's statements were false.

> However, we do not agree with Topp's assertion that this is a fatal defect. It is true that the content of pleadings in disciplinary cases must comport with I.R.C.P. 10. I.B.C.R. 522(h). However, I.B.C.R. 511(a) sets its own standard as to the sufficiency of allegations in a complaint: the allegations "must be specific enough to inform the defendant of the alleged misconduct." The allegations in the complaint filed in this case are clearly sufficient to inform Topp that, due to his statements to the media, he is alleged to have violated I.R.P.C. 8.2(a).

With regard to the second element of the analysis, there is no contention that Topp had actual knowledge that his statement was false. Thus, the question is whether Topp was "objectively reckless" in making that statement to the media. The bases asserted by Topp as support for his comments are as follows: (1) there was a political frenzy in Bonner County with regard to property tax issues; (2) the immediate release of the decision could lend support to an inference that the case was decided prior to argument and that Judge Michaud was concerned with disseminating that decision to the public quickly; and (3) another district judge in a similar case had reached a different decision. We conclude that a reasonable attorney, in considering these facts, would not have made the statement in question. Because Topp's statement necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations, it impugned his integrity. Therefore, we hold that the ISB established a violation of I.R.P.C. 8.2(a) and that a public reprimand is the appropriate sanction for that violation.

VI.
CONCLUSION

The hearing committee's recommendation that Topp be

assessed a public reprimand is adopted.

McDEVITT, C.J., and JOHNSON and SILAK, JJ., concur.

SCHROEDER, Justice, dissenting.

I would like very much to agree with the conclusion of the Court in this case. Some public speech has a purpose; some does not. There is no discernable purpose in the comments that were made by Mr. Topp. However, that is not the standard for determining if disciplinary action should take place.

The Court correctly capsulizes the issue in its comment in Section IV: "Statements impugning the integrity of a judge 'may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." ' "

The analysis of what constitutes an opinion and what implies a fact can be complex. However, underlying any analysis is the commonly understood reality that it is often impossible to discern what is in another person's mind and what subjective motivations exist within that person's mind. Topp could not know what was in Judge Michaud's mind or what was in Judge Kosonen's mind. Anybody reviewing Topp's comments would understand that. Topp's comments dealt with a subject matter that he could not know--the internal motivation of a judge making a decision. Two consequences flow from this: the first a matter of social decency; the other a principle of constitutional law. Since Topp could not know what was in Judge Michaud's mind, it was a matter of social indecency to impugn the judge's character by speculation. However, a reader or listener with common sense would understand that the comments were

statements of opinion. That understanding of the nature of the comments as an opinion cloaks Mr. Topp in the protection afforded by the First Amendment.

It is easier to defend speech that has a social purpose than to defend speech that seems to have no point except to degrade another person. However, that is not the line the First Amendment draws. The noble purposes for the constitutional protection of speech have been set forth numerous times with great eloquence. Attempting a new flourish would add nothing to the wisdom inherent in the protection of speech in our constitutional structure. The speech at issue in this case falls within that circle of protection.

APPENDIX A

Appendix B 1

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF JOHN R. TOPP, ATTORNEY AT LAW.

ORDER AND REMITTITUR

IDAHO STATE BAR,
Plaintiff-Respondent,

No. 21760

vs.

JOHN R. TOPP
Defendant,

TO: JOHN R. TOPP AND THE PROFESSIONAL CONDUCT BOARD, IDAHO STATE BAR

The Court having reviewed the recommendation of the Hearing Committee of the Professional Conduct Board and having announced its opinion in this cause August 13, 1996, which has now become final; therefore,

IT HEREBY IS ORDERED that the opinion of this Court announced August 13, 1996, be, and hereby is, FINAL, and the Hearing Committee's recommendation that John R. Topp be assessed a public reprimand be, and hereby is, ADOPTED.

IT FURTHER IS ORDERED that the Defendant's conduct in this matter has been improper and he is assessed a PUBLIC REPRIMAND, which does not limit his right to practice law; however, this public reprimand shall be published in the official Idaho State Bar publication ;under I.B.C.R. 506 (e).

APPENDIX B

DATED this 4th day of October, 1996.

By Order of the Supreme Court

_____

Frederick C. Lyon, Clerk

cc: Counsel of Record
John R. Topp, Esq.
Diane K. Minnich, Ex. Dir., ISB

APPENDIX B

Appendix C 1

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF JOHN R. TOPP, ATTORNEY AT LAW.

IDAHO STATE BAR,
Plaintiff-Respondent,

vs.

JOHN R. TOPP

Defendant-Petitioner.

ORDER DENYING PETITION FOR REHEARING

No. 21760

Ref. No. 96RH-23

The respondent having filed a PETITION FOR REHEARING on August 30, 1996 and supporting BRIEF on September 16, 1996 of the Court's Opinion released August 13, 1996; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING. be, and hereby is, DENIED.

DATED this 4th day of October, 1996.
By Order of the Supreme Court

Lois Dawson, Chief Deputy Clerk for
Frederick C. Lyon, Clerk

cc: John R. Topp
Michael J. Oths
Dianne K. Minnich

APPENDIX C

Appendix D 1

BEFORE THE PROFESSIONAL CONDUCT BOARD OF THE IDAHO STATE BAR

IDAHO STATE BAR,
Plaintiff,

ISB File No. FC 94-005

vs.

JOHN R. TOPP
Defendant,

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Professional Conduct Board Hearing/Review Committee consisting of Lynn Melton, Robert C. Huntley and Hugh Mossman as provided by Bar Commission Rule 511 (b) and Order of the Supreme Court dates may 19, 1994. The Hearing committee was convened on October 11, 1994 to hear oral arguments on Defendant's Motion For Summary Judgment and Dismissal. Appearing at the hearing, via telephone conference call, were the Plaintiff's attorney, Michael Oths; the Defendant, John R. Topp; and the Defendant's attorney, George Critchlow. The American Civil Liberties Union filed an Amicus Curiae Brief on September 23, 1994 in support of Defendant's Motion To Dismiss and for Summary Judgment but did not appear at the hearing or participate in the oral argument. Following oral argument on the Motions, the parties filed a Stipulation To Proceed On Agreed Facts with the Professional Conduct Board on October 12, 1994. The evidentiary hearing scheduled in this matter to begin in Sandpoint, Idaho on October 18, 1994 was vacated by agreement of the parties and this matter has therefore been fully submitted to the Committee for decision. Having reviewed the evidence and testimony presented through the affidavits, depositions and

the Stipulation, the undersigned Hearing/Review Committee makes the following proposed Findings of Fact and Conclusions of Law and submits the same to the Professional Conduct Board.

PROPOSED FINDING OF FACT

I

Defendant John R. Topp was admitted to the practice of law in the State of Idaho in 1989 and has engaged in the private practice of law in Sandpoint, Idaho at all times relevant to this case.

II

Defendant had represented Bonner County on several civil matters unrelated to this case. Defendant was known by the media to have been an attorney for Bonner County. In 1993, Bonner County petitioned District Court Judge James R. Michaud for a judicial confirmation of a refuse transfer station at an estimated expense of 4.1 million dollars. The county sought approval of the expenditure as an "ordinary and necessary" expense without voter approval. The county was represented by attorney Dana Wetzel in this proceeding. In 1993 and 1993 taxpayers in Bonner County had filed a petition to roll back property taxes and had voted two County Commissioners out of office partially because of voter concern over increased property taxes.

III

On October 4, 1993 Judge Michaud issued a Memorandum Opinion and Order both in writing and verbally in open court denying the county's petition. Defendant was present in court at the time of the judge's ruling.

IV

Immediately following the hearing, several news reporters asked Defendant for his reaction to the judge's decision. The Defendant's response was cited in news reports by the Spokane Review newspaper and KSPT-KPND radio on October 4, 1993. The newspaper article stated in part:

> "I think it's bull," Topp said of the ruling. Topp said it could be impossible to get voters to approve a tax hike for solid waste hauling. He also charged Judge Michaud's decision was politically motivated, because the judge did not want to face angry taxpayers when he's up for election in November."

The radio reports stated in part:

> "County Attorney, John Topp is critical of the ruling. District Judge Craig Kosonen recently granted a similar petition by Shoshone County ... Topp said there's no difference between the two cases, except Judge Kosonen ... quoting directly ... wasn't worried about the ramifications."

A complete copy of each news report has been attached as an appendix to these findings. Defendant denied that he "charged" that Judge Michaud's decision was politically motivated, but admits that he "implied" the same.

V

Judge Michaud denies that his decision dated October 4, 1993 was politically motivated, and there is no proof that it was. The written decision of Judge Michaud appears to rely on legal precedent as a basis for his decision.

VI

APPENDIX D

The implication of political motivation challenged the integrity and qualification of Judge Michaud. Defendant's statements implied that the judge decided the case to protect his own self interest.

VII

Defendant's statements were made with reckless disregard as to the truth because Defendant:

(1) had no knowledge that the decision was politically motivated;

(2) knew that the implication of political motivation could not be proved or disproved; and

(3) knew or should have known that his statements would be published in the media.

CONCLUSIONS OF LAW

I

Defendant's statements on October 4, 1993 violated I.R.P.C. Rule 8.2 (a) in that said statements were made with reckless disregard as to the truth or falsity concerning the qualification of Judge Michaud.

II

The language and intent of Rule 8.2 (a) is clear. One of the objectives of this rule is the administration of justice through public respect for the judicial system. The Committee finds that this is a legitimate State interest.

III

Defendant's Motions for dismissal and summary judgment and his defense to Plaintiff's Complaint raise constitutional First Amendment issues. The resolution of these issues requires the Committee to balance Defendant's First Amendment right to free speech against the State's interest in the administration of justice.

IV

After carefully considering the arguments of the parties and the Amicus Curiae Brief, the Committee concludes that in balance, the interest of the State must prevail under the facts of this case. Lawyers are officers of the court and must be held to a higher standard than members of the general public. Attorneys in the State of Idaho have a nonpublic forum to register complaints against judges through the Judicial Council. Judges are not permitted the opportunity of publicly defending their integrity when challenged. The public's respect for the judicial system would be seriously compromised if attorneys were permitted to publicly accuse or even imply judicial impropriety on the basis of mere speculation.

V

The Committee therefore concludes that the Defendant's Motions must be denied and enters judgment for Plaintiff. An appropriate sanction in this matter is a public reprimand as defined in I.R.P.C. Rule 506 (e).

Appendix E 1

BEFORE THE PROFESSIONAL CONDUCT BOARD OF THE IDAHO STATE BAR

IDAHO STATE BAR,
Plaintiff,

ISB File No. FC 94-005

vs.

STIPULATION TO PROCEED ON AGREED FACTS

JOHN R. TOPP
Defendant,

The parties to the above-captioned matter hereby stipulate that the empaneled Hearing Committee may decide this matter on the following basis.

1) By accepting the depositions of Kevin Keating, Mike Brown and John Topp in lieu of live testimony. (The parties stipulate that the answer "Um-hmm" at p. 25, L. 15 of Kevin Keating's deposition is an affirmative answer).

2) By agreeing to admission of attached Exhibit "A" (Newspaper story of Kevin Keating, entitled "Judge kills plan to fund trash system"), attached Exhibit "B" (Mike Brown radio copy titled "Garbage Bux Rejex"), and attached Exhibit "C" (Judge Michaud's decision on the judicial confirmation proceeding).

3) By agreeing that Judge Michaud would testify that his decision in the judicial confirmation proceeding was not politically motivated, without stipulating as to the truth or falsity of that statement. Also, by stipulating to this

testimony, the defense does not waive its right to argue that the pleadings are defective by not alleging falsity, and/or to argue that IRPC 8.2 is fatally unconstitutional.

4) By agreeing to the following additional stipulated facts:

(a) That a "political frenzy" concerning property taxation issues was occurring in Bonner County in and around the time of the judicial confirmation proceeding, and that Judge Michaud was aware of that political frenzy.

(b) That recall petitions, initiated by citizens raising property tax issues, targeting a number of elected county officials (not Judge Michaud) had been filed prior to the time of the judicial confirmation proceeding. Additionally, a petition bearing 6,000 signatures and seeking a property tax rollback had been filed prior to the time of the judicial confirmation proceeding. Judge Michaud was aware of both filings prior to ruling on the judicial confirmation proceeding.

(c) That Mr. Topp would call a number of character witnesses to testify as to his truth and veracity and as to his good character, and that the Idaho State Bar is not aware of any basis on which to dispute or impeach that testimony.

Based on the above record, it is stipulated that the Hearing Committee may consider the matter fully submitted and decide the case.

APPENDIX E

Supreme Court, U.S.
FILED
FEB 10 1997
CLERK

(2)

No. 96-1098

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN R. TOPP,

Petitioner,

v.

IDAHO STATE BAR,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Idaho

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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February 10, 1997

19 pp

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *GENTILE* PROHIBITS THE OVERBROAD APPLICATION OF RULE 8.2(a) TO PUNISH LAWYERS FOR SPEECH CRITICAL OF JUDGES OR THE JUDICIARY 3

II. LAWYERS MAY NOT BE DISCIPLINED UNDER RULE 8.2(a) IF THEY SPEAK WITHOUT CONSTITUTIONAL MALICE 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Brown v. Board of Education, 347 U.S. 483 (1954) 9

Butterworth v. Smith, 494 U.S. 624 (1990) 3

Committee on Legal Ethics v. Douglas,
370 S.E.2d 325 (W. Va. 1988),
cert. denied, 493 U.S. 964 (1989) 11

Garrison v. Louisiana, 379 U.S. 64 (1964) 2, 10, 11, 12

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991) 2, 3, 4, 6, 7, 8

In re Frerichs, 238 N.W.2d 764 (Iowa 1976) 6

In re Graham, 453 N.W.2d 313,
reinstatement ordered, 459 N.W.2d 706 (Minn.),
cert. denied, 498 U.S. 820 (1990) 6, 12

In re Hinds, 449 A.2d 483 (N.J. 1982) 6, 7

In re Holtzman, 577 N.E.2d 30 (N.Y.),
cert. denied, 502 U.S. 1009 (1991) 12

In re Kaiser, 759 P.2d 392 (Wash. 1988) 11

In re Primus, 436 U.S. 412 (1978) 3

In re Terry, 394 N.E.2d 94 (Ind. 1979),
cert. denied, 444 U.S. 1077 (1980) 12

In re Westfall, 808 S.W.2d 829 (Mo.), *cert. denied*, 502 U.S. 1009 (1991) 4, 5, 12

Louisiana State Bar Association v. Karst, 428 So. 2d 406 (La. 1983) 12

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 9

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 10, 11, 12

Pickering v. Board of Education, 391 U.S. 563 (1968) 11, 12

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 2

Ramirez v. State Bar, 619 P.2d 399 (Cal. 1980) 11

Ramsey v. Board of Professional Responsibility, 771 S.W.2d 116 (Tenn.), *cert. denied*, 493 U.S. 917 (1989) 11

Roe v. Wade, 410 U.S. 113 (1973) 9

Romer v. Evans, 116 S. Ct. 1620 (1996) 9

Rosenberger v. University of Virginia, 115 S. Ct. 2510 (1995) 2

Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) 9

Standing Committee on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995) 7, 8, 12

State v. Nelson, 504 P.2d 211 (Kan. 1972) 6

United States District Court v. Sandlin,
12 F.3d 861 (9th Cir. 1993) 12

ETHICS MATERIALS

Judicial Criticism, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) (1993) 5, 6

MODEL RULE OF PROFESSIONAL CONDUCT 8.2(a) 3, 4, 5, 10

MODEL RULE OF PROFESSIONAL CONDUCT 8.4(d) 3, 4

BOOKS, TREATISES, AND ARTICLES

Esther Berkowitz-Cabellero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494 (1993) 6

Elizabeth A. Bridge, *Professional Responsibility and the First Amendment: Are Missouri Attorneys Free to Express Their Views?: Matter of Westfall*, 57 MO. L. REV. 699 (1992) 11

Jeanne D. Dodd, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. KY. L. REV. 129 (1988) 6

Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799 (1991) 8, 9

Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981 (1992) 8

Geoffrey C. Hazard & W. William Hodes, 2 THE LAW OF LAWYERING § 8.2:201 (1985 & Supp. 1996) 7

Carol T. Rieger, *Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?*, 2 CONST. COMMENT. 69 (1985) 6

Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357 (1995) 6

David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991) 9

Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) 9

Bernard Wolfman, et al., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235 (1973) 9

PERIODICALS

Lawyers Defend Judge Criticized by Dole, ASSOCIATED PRESS, Apr. 23, 1996 9

Restraint, please, SAN DIEGO UNION & TRIB., Aug. 11, 1984 9

Second Circuit Chief Judges Criticize Attacks on Judge Baer, N.Y.L.J., Mar. 29, 1996 9

Andrea Ford & Jim Newton, *Prosecutors Opt Not to Include Simpson Chase*, L.A. TIMES, Sept. 14, 1995 8

Stuart Pfeifer, *Lawyers Criticize Judge's Ng Ruling*, ORANGE COUNTY REG., Aug. 30, 1996 8

Leslie Scism, *Prudential Insurance Sales Litigation is Beset by Charges of Improper Conduct*, WALL ST. J., Dec. 10, 1996 8

No. 96-1098

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN R. TOPP,

Petitioner,

v.

IDAHO STATE BAR,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Idaho

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is submitted in support of the Petitioner, John R. Topp. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The Center for Individual Rights ("CIR") is a non-profit public interest law firm founded in 1989. Through its litigation activities, CIR seeks to advance respect for individual rights.

Many of the cases in which CIR has participated have involved the First Amendment. *E.g., Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). CIR believes that in recent years, governmental entities and courts have circumscribed fundamental First Amendment freedoms in the pursuit of less than compelling objectives. This case is another example of the government limiting speech on a matter of significant public interest, thereby chilling constitutionally protected expression.

SUMMARY OF ARGUMENT

This Court has already held that the First Amendment protects lawyers who criticize the judiciary and its officers. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Court held that lawyers have a constitutional right to criticize the judiciary, so long as it will not prejudice an ongoing legal proceeding. And in *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court held that criticism of judges cannot be prosecuted as defamation unless the traditional prerequisites of a defamation claim, including constitutional malice, have been proved.

Surprisingly, many states have ignored these precedents when applying their disciplinary rules to lawyers. While some courts have followed the holdings of *Gentile* and *Garrison*, many others — including the Supreme Court of Idaho in this case — continue to interpret their ethical rules as prohibiting all judicial criticism and permitting the punishment of "defamatory" criticism without proof of constitutional malice. This Court should grant the petition for certiorari to resolve the splits among the state supreme courts and to reverse the pervasive chilling effect such decisions have had on political speech by lawyers.

ARGUMENT

I. *GENTILE* PROHIBITS THE OVERBROAD APPLICATION OF RULE 8.2(a) TO PUNISH LAWYERS FOR SPEECH CRITICAL OF JUDGES OR THE JUDICIARY

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), this Court held that the First Amendment prohibits states from punishing lawyers for speech critical of the judiciary, so long as there is no substantial likelihood that the speech will materially prejudice an adjudicative proceeding in which the lawyer is participating. *Id.* at 1075. *Gentile* reaffirmed two core constitutional principles: that "speech critical of the exercise of the State's power lies at the very center of the First Amendment," *id.* at 1034 (opinion of Kennedy, J.), and that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment," *id.* at 1054 (opinion of Kennedy, J.). *See also Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *In re Primus*, 436 U.S. 412, 421-26 (1978).

Notwithstanding *Gentile*, many states have continued to apply their disciplinary rules to punish lawyers whose sole "offense" is to speak critically of public officials and their conduct in office. These jurisdictions have perfunctorily obeyed the holding of *Gentile* and have not punished this type of political speech under rules prohibiting conduct "prejudicial to the administration of justice." *See* MODEL RULE OF PROFESSIONAL CONDUCT 8.4(d).[1/] Instead, they have applied their counterparts of Model Rule 8.2(a),

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1/ Model Rule 8.4(d) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." The disciplinary rule at issue in *Gentile* was substantially similar: "A lawyer shall not make an extrajudicial statement . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile*, 501 U.S. at 1060-61 (*quoting* NEV. SUP. CT. R. 177(1) (1991)).

which prohibits lawyers from making statements that are defamatory of judges,[2/] to achieve precisely the same result. *See, e.g., In re Westfall*, 808 S.W.2d 829, 839 (Mo.) (en banc) ("The charges brought under Rule 8.4 are encompassed within the violation of Rule 8.2(a) in this case and, for purposes of imposition of discipline, cannot be distinguished."), *cert. denied*, 502 U.S. 1009 (1991). The Idaho State Bar's reprimand of Petitioner for characterizing a court's ruling as motivated by "political ramifications," *see* Petitioner's App. A5, is but one of those many cases.

The Idaho Supreme Court's application of Rule 8.2(a) in this case is plainly inconsistent with this Court's reasoning in *Gentile*. There can be no question that what is at issue here is classic political speech, critical of the government and its officers. *See Gentile*, 501 U.S. at 1034-35. The Petitioner was sanctioned simply for suggesting that an elected judge's decision on a controversial issue appeared to have been influenced by "the political ramifications" of the case. (*See* Petitioner's App. A5.) This type of general criticism of judicial decisions — commonplace in legal reporting, academia, and dissenting opinions — is well within the category of speech protected by *Gentile*. And yet the Idaho Supreme Court has sought to silence general criticism by characterizing Petitioner's speech as a

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2/ Model Rule 8.2(a) provides: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." Twenty-nine states, in addition to Idaho, have adopted a rule of professional conduct with language identical to that of Model Rule 8.2(a): Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming. An additional eleven states have adopted substantially similar rules: Colorado, Florida, Hawaii, Massachusetts, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, and Washington.

defamatory statement concerning a judge, and thus proscribable under Rule 8.2(a).

Unfortunately, Idaho's use of Rule 8.2(a) as a tool for chilling critics of its judiciary is hardly unique. Enough states have followed this expansion of the rule that even the American Bar Association's *Lawyers Manual on Professional Conduct* casually observes that "[d]espite the express provisions of the Rules and Code, which prohibit only false criticism of the judiciary, courts have traditionally interpreted these standards . . . as restricting all lawyer criticism, whether false or not." *Judicial Criticism*, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 101:602 (1993). For example, Missouri lawyer George E. Westfall was sanctioned for criticizing a court's decision as illogical and result-oriented. *Westfall*, 808 S.W.2d at 839. Mr. Westfall had stated:

> [B]ut for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes. . . . And that, to me, really means he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

Id. at 831-32. Many states have adopted comparable interpretations of their ethical guidelines.[3/] Others, however, have rejected such broad limitations on lawyer speech. For example, the New Jersey Supreme Court held in *In re Hinds*, 449 A.2d 483 (N.J. 1982), that an attorney who is not "involved in a pending

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[3/] *See, e.g., In re Graham*, 453 N.W.2d 313, 321 (Minn.) (per curiam), *reinstatement ordered*, 459 N.W.2d 706, *cert. denied*, 498 U.S. 820 (1990); *In re Frerichs*, 238 N.W.2d 764, 767-68 (Iowa 1976) (en banc); *State v. Nelson*, 504 P.2d 211, 214-16 (Kan. 1972) (per curiam); *see also* LAWS. MAN. ON PROF. CONDUCT at 101:601 ("Many courts have interpreted the ethical publication against false statements as also restricting judicial criticism in general.").

criminal matter" and criticizes the presiding judge may not be disciplined absent a " 'clear and present danger' . . . to the fairness and integrity of the judicial system." *Id.* at 498-99.

Application of a disciplinary rule to prohibit general criticism of the judiciary was precisely the principle rejected by the Court in *Gentile*. The same result is no more permissible when achieved by interpreting a different disciplinary rule. Under the reasoning of *Gentile*, any state-imposed prohibition on general criticism of the judiciary by lawyers is unconstitutional unless there is a "substantial likelihood of material prejudice" to the administration of justice. *See Gentile*, 501 U.S. at 1075.

Idaho's punishment of Petitioner cannot survive *Gentile*.[4/] Petitioner had not served as counsel in the case on which he commented, and the case was not pending before the court when Petitioner uttered his criticism. (Petitioner's App. A2.) As the Ninth Circuit concluded in *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), restrictions on a lawyer's speech are difficult to justify when there is no case pending before the court:

> When lawyers speak out on matters unconnected to a pending case, there is no direct and immediate impact on the fair trial rights of litigants. Information the lawyers impart will not be viewed

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[4/] Indeed, commentators have noted that state bar associations are rarely able to justify their disciplinary rules on speech. *See, e.g.*, Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 358 (1995); Esther Berkowitz-Cabellero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 524-537 (1993); Jeanne D. Dodd, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. KY. L. REV. 129, 143-146 (1988); Carol T. Rieger, *Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?*, 2 CONST. COMMENT. 69, 85-87 (1985).

> as coming from confidential sources, and will not have a direct impact on a particular jury venire. Moreover, a speech restriction that is not bounded by a particular trial or other judicial proceeding does far more than merely postpone speech; it permanently inhibits what lawyers may say about the court and its judges — whether their statements are true or false.

Id. at 1443.[5/] The Ninth Circuit also recognized the dangers that would ensue if the protections recognized in *Gentile* were undermined:

> Much speech of public importance — such as testimony at congressional hearings regarding the temperament and competence of judicial nominees — would be permanently chilled if the rule in *Gentile* were extended beyond the confines of a pending matter.

Id. That observation is hardly exaggerated. The speech for which Petitioner was punished is indistinguishable from that uttered each day by lawyers speaking in the media,[6/] by lawyers who file

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[5/] *Accord Hinds*, 449 A.2d at 498-99 ("An attorney with no supervening professional responsibilities in a pending criminal case would seemingly enjoy the same free speech rights as any other citizen."); *see also* 2 Geoffrey C. Hazard & W. William Hodes, THE LAW OF LAWYERING § 8.2:201, at 934 (1985 & Supp. 1996) ("Plainly an uninvolved lawyer . . . who attacks a judge or a court decision in a public forum should not be subject to more restrictions than an ordinary citizen, merely because he happens to be a lawyer.").

[6/] For example, Los Angeles District Attorney Gil Garcetti, in the course of the criminal trial against O.J. Simpson, made several criticisms of Judge Lance Ito:

> The way the prosecution has been treated in this case is simply unacceptable. . . . I am sick and tired . . . of this judge not treating the

motions criticizing judges,[7/] by lawyers in academia,[8/] by lawyers

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> prosecution fairly. The defense gets away with murder. . . . [T]here just isn't any legal basis for what he did. . . . He overstepped all legal grounds.

Andrea Ford & Jim Newton, *Prosecutors Opt Not to Include Simpson Chase*, L.A. TIMES, Sept. 14, 1995, at A1, A17. In another California case, a lawyer criticized a Superior Court judge's decision to remove the Orange County Public Defender's Office from participation in the defense of a serial-murder suspect as motivated by the judge's dislike of a particular Deputy Public Defender: " 'The court was not only openly biased against [the Deputy], it acted on that bias in granting [the suspect]'s request in order to punish his counsel.' " Stuart Pfeifer, *Lawyers Criticize Judge's Ng Ruling*, ORANGE COUNTY REG., Aug. 30, 1996, at B1, *available in* 1996 WL 7045609.

7/ For example, lawyers in one case accused U.S. District Judge Alfred Wolin of engaging in "'increasingly injudicious behavior' showing a bias toward [a proposed settlement] in violation of a duty to remain impartial." Leslie Scism, *Prudential Insurance Sales Litigation is Beset by Charges of Improper Conduct*, WALL ST. J., Dec. 10, 1996, at B10.

8/ Members of this Court, past and present, have had their motivations questioned by academics. For example, scholars have suggested that Justice Scalia's opinions are motivated by a desire to reach conservative results in particular cases. *See, e.g.*, Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1032-34 (1992); Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1800 (1991); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1715 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1098 (1990). Justice Douglas had his motivation in tax cases questioned by another group of scholars. *See* Bernard Wolfman et al., *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235, 276 (1973).

in the executive and legislative branches,[9/] and even by judges.[10/]

Some of the most significant decisions rendered by this Court have been criticized by lawyers, scholars, and judges as motivated more by the "political ramifications" than the merits. *See, e.g.*, *Romer v. Evans*, 116 S. Ct. 1620 (1996); *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Such criticism may be unsavory and undeserved. Nevertheless, chilling such speech as the Idaho Supreme Court has done offends the core values of the First Amendment

II. LAWYERS MAY NOT BE DISCIPLINED UNDER RULE 8.2(a) IF THEY SPEAK WITHOUT CONSTITUTIONAL MALICE

The Idaho Supreme Court has substantially ignored the standards set forth in this Court's decisions in *New York Times*

9/ Both President Clinton and then-Senate Majority Leader Dole criticized U.S. District Judge Harold Baer, Jr. for his rulings in recent cases. *See Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y. L. J., Mar. 29, 1996, at 4. Senator Dole also has criticized particular federal judges for being "an all-star team of liberal leniency" and suggesting that several of them should be in a "hall of shame." *See Lawyers Defend Judge Criticized by Dole*, ASSOCIATED PRESS, Apr. 23, 1996, *available in* 1996 WL 5378866.

10/ Justice Stevens, for example, has criticized the motivations of various members of this Court, accusing them of engaging in "'enthusiastic attempts to codify the law instead of merely performing the judicial task of deciding the cases that come before them.'" *Restraint, please*, SAN DIEGO UNION & TRIB., Aug. 11, 1984, at B8. Similarly, in *Romer v. Evans*, 116 S. Ct. 1620 (1996), Justice Scalia's dissent, which was joined by Chief Justice Rehnquist and Justice Thomas, suggested that the majority's invalidation of a state constitutional amendment was an act "not of judicial judgment, but of political will." *Id.* at 1637.

Co. v. Sullivan, 376 U.S. 254 (1964) and *Garrison v. Louisiana*, 379 U.S. 64 (1964). These cases stand for the proposition that a person cannot be sued or punished for defamation of a public official unless all of the prerequisites of a civil defamation claim, including constitutional malice, have been shown. *New York Times*, 376 U.S. at 279-80; *Garrison*, 379 U.S. at 67-68. Idaho's reprimand of Petitioner — a punitive sanction for a supposedly defamatory statement of fact — does not meet that standard.

In *Garrison*, a district attorney was prosecuted for questioning the motives of a group of criminal court judges, when he suggested that their rulings "'raise[] interesting questions about the racketeer influences on our eight vacation-minded judges.'" *Id.* at 64-66. On review of Garrison's bench trial conviction for criminal libel, the Court, relying on *New York Times*, reversed the state's criminal sanction and rejected the view that Garrison's statement was an attack on the personal integrity of the judges rather than their official conduct. *Id.* at 74-77.

The *Garrison* decision clarified that the constitutional limits on defamation actions are not lessened merely because the nature of the proceeding is punitive:

> Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations.

Id. at 67. The Court reinforced that principle in *Pickering v. Board of Education*, 391 U.S. 563 (1968), where it held that the same limitations apply in administrative proceedings to discipline state employees who criticize the agencies they serve:

"[S]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Id.* at 574.

New York Times and its progeny have been interpreted by many courts as imposing the same constitutional limitations — constitutional malice, or scienter — on attorney discipline proceedings.[11/] Relying on the justification of protecting the "administration of justice," however, other courts have adopted a lower standard for attorney discipline cases, under which knowledge of falsity is not determined by the genuineness of a lawyer's belief in the truth, but rather by the *reasonableness* of that belief. *See Graham*, 453 N.W.2d at 321-22; *Westfall*, 808 S.W.2d at 836-37.[12/] These cases, which have applied an objective standard in attorney disciplinary proceedings, appear to contradict this Court's reasoning in *New York Times*, *Garrison*, and *Pickering*.

11/ *See, e.g., Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 121 (Tenn.), *cert. denied*, 493 U.S. 917 (1989); *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325, 332 (W. Va. 1988), *cert. denied*, 493 U.S. 964 (1989); *In re Kaiser*, 759 P.2d 392, 398 (Wash. 1988) (en banc); *Ramirez v. State Bar*, 619 P.2d 399, 404 (Cal. 1980) (en banc) (per curiam); Elizabeth A. Bridge, *Professional Responsibility and the First Amendment: Are Missouri Attorneys Free to Express Their Views?: Matter of Westfall*, 57 MO. L. REV. 699, 722 (1992) (*citing* MODEL RULE OF PROF. CONDUCT 8.2 (Proposed Final Draft 1981)) ("The legal background of Model Rule 8.2 reveals that the drafters intended that a subjective standard would apply to the constitutional analysis. The drafters stated that the critical factors in the analysis were the statement's falsity and the individual's knowledge of the falsity at the time the statement was made.").

12/ *See also Yagman*, 55 F.3d at 1437; *United States Dist. Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993); *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y.) (per curiam), *cert. denied*, 502 U.S. 1009 (1991); *Louisiana State Bar Ass'n v. Karst*, 428 So. 2d 406, 409 (La. 1983); *In re Terry*, 394 N.E.2d 94, 95-96 (Ind. 1979) (per curiam), *cert. denied*, 444 U.S. 1077 (1980).

This Court should grant certiorari in this case to resolve the conflicts among numerous state and federal courts and to reaffirm the principles enunciated in *New York Times* and its progeny:

> [E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.

Garrison, 379 U.S. at 73.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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NO. 96-01098

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOHN R. TOPP, Petitioner

v.

IDAHO STATE BAR, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTIONS PRESENTED

1. May a state Supreme Court constitutionally impose professional discipline for a lawyer's false statement about a judge's integrity, if the court has found he has done so in an objectively reckless manner, without proof of actual malice as defined in *New York Times v. Sullivan*?

2. May a state Supreme Court constitutionally impose professional discipline for a lawyer's false statement that a judge decided a case other than on the merits, in the unique circumstance where the record is uncontroverted that the statement was indeed false?

3. [Same as stated by Petitioner] Should this Court summarily reverse the decision of the Idaho Supreme Court based on the undisputed facts and this Court's prior opinions regarding protected speech under the First Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF CONTENTS 2

TABLE OF CITATIONS 3

CITATION OF CASE BELOW 4

JURISDICTION 4

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS THE PETITION SHOULD NOT BE GRANTED 7

1) The decision of the Idaho Supreme Court does not conflict with prior decisions of this Court 7

2) There is no conflict in the lower courts about the standard to be used. In fact, the standard is developing in a consistent manner 9

CONCLUSION 12

TABLE OF CITATIONS

CONSTITUTIONAL PROVISIONS

United States Constitution, amend. I 1, 5, 7, 8, 10

CASES

Eisenberg v. Boardman,
302 F. Supp. 1360 (W.D. Wis.1969) 10
Garrison v. Louisiana, 379 U.S. 64 (1964) 7
Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).....8
In Re Graham, 453 N.W.2d 313 (Minn. 1990), *cert. denied*,
498 U.S. 826 (1990).....9
Matter of Westfall, 808 S.W. 2nd 829 (Mo. 1991) 9
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).....8
New York Times v. Sullivan, 376 U.S. 254 (1964).....1, 7, 8
Ramirez v. State Bar of California, 619 P.2d 399 (1980).....10
St. Amant v. Thompson, 390 U.S. 727 (1968).....7, 8
Standing Committee on Discipline v. Yagman,
55 F.3d 1430 (9th Cir. 1995) 9, 10
State Bar v. Semaan,
508 S.W. 2d.429 (Tex.Civ.App. 1974).....10
U.S. District Court v. Sandlin, 12 F.3d 861 (9th Cir. 1993)...9

OTHER AUTHORITIES

Model Rules of Professional Conduct, Rule 8.2(a).....4, 9, 10
Annotated Model Rules of Professional Conduct,
(American Bar Association, 1996, 3rd Ed.).....9
Idaho Rule of Professional Conduct 8.2(a).....4

CITATION OF CASE BELOW

This matter has now been reported at 925 P.2d 1113 (1996).

JURISDICTION

Respondent concurs with Petitioner's statement of jurisdiction.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner has incorrectly stated the text of Idaho Rule of Professional Conduct 8.2(a). That rule and the identical American Bar Association Model Rule 8.2(a) both state:

Rule 8.2 - Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications *or integrity* of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. [The emphasized words were omitted in Petitioner's version].

STATEMENT OF THE CASE

While Respondent generally agrees with Petitioner's statement of the case, there are several clarifications that should be made.

First, while Petitioner understandably chooses to refer to this matter as a "judicial criticism" case, it is actually a "false statement about judges" case. All of the authorities and both parties in this case agree that actual criticism is protected by the First Amendment.

Additionally, this case presents a record that is unlikely to present much precedential value. Uniquely, the determination that *the statement was false* is uncontroverted. The record of this case was submitted entirely on stipulation, and because Petitioner chose not to try to prove that his statement was true, the Idaho Supreme Court reached the only possible conclusion:

> We conclude that ISB has established, for purposes of this case, that Topp's statements as to Judge Michaud's motivation were false. [FN2 omitted]. The parties stipulated that Judge Michaud would testify that his decision in the judicial confirmation proceeding was not politically motivated. Although Topp makes much of the fact that the parties did not stipulate to the truth of this testimony, we are aware of no requirement that parties must stipulate to the truth of evidence in the record before a court may consider that evidence. The stipulated testimony of Judge Michaud is not controverted, and the parties'

failure to stipulate as to the truth of that evidence is irrelevant. Petitioner's App. A7.

With those clarifications, Respondent accepts Petitioner's statement of facts.

REASONS THE WRIT SHOULD NOT BE GRANTED

1) The decision of the Idaho Supreme Court does not conflict with prior decisions of this Court.

Petitioner creates an artificial "conflict" in trying to compare the instant case to prior decisions of this Court. In fact, this Court has never addressed the issue of lawyer discipline for demonstrably false statements about a judge, nor has it undertaken to review discipline for violations of Model Rule 8.2(a) or its prior versions, at least since *New York Times v. Sullivan*, 376 U.S. 254 (1964).

While Petitioner bases much of his argument on *New York Times v. Sullivan* and its progeny, the first cited case that he offers is *Garrison v. Louisiana,* 379 U.S. 64 (1964). *Garrison* is actually a criminal case. The *Garrison* prosecution was fatally defective because it permitted criminal conviction even in the case of *truthful* statements. That overbreadth problem, coupled with the archaic theory of seditious libel, was the basis for reversing the Louisiana Supreme Court.

Petitioner then argues that the instant case presents a clear conflict with the *New York Times v. Sullivan* and following cases, notably *St. Amant v. Thompson*, 390 U.S. 727 (1968). First, it is significant that those matters were civil damage cases, while this is a lawyer discipline case. Petitioner's suggestion that the resolution of this case involves a simple application of the defamation cases is wrong. Very different considerations are present in the lawyer discipline context. As Petitioner grudgingly concedes, this Court recognized less than a *New York Times* standard in its only recent First

Amendment / lawyer discipline case, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

This case is part of a developing line of case law, following a logical evolution from *New York Times.* In the *St. Amant* case, this Court noted:

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case by case adjudication, as is true with so many legal standards . . . . 390 U.S. 727 at 730.

The reasoning of the Idaho Supreme Court, following recent precedent in both state and federal courts (as discussed below), is compatible with the evolution of *New York Times*.

Petitioner also suggests that the decision is in conflict with *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). That decision, while declining to adopt an "opinion vs. fact" distinction, held that civil liability could not be imposed for statements not capable of being proven true or false.

This Court in *Milkovich* recognized that the implication contained in a speaker's remarks was important in considering whether the statements were actionable -- whether the context suggests other undisclosed facts. This important point was carefully incorporated into the decision in this case. The Idaho Supreme Court did not simply rely on an "opinion vs. fact" distinction, but specifically noted *Milkovich* in its opinion:

> This statement insinuates that Topp was privy to some facts about the two cases and about the motivation of Judge Kosonen in rendering his decision. Petitioner's App. A5.

This case does not conflict with prior decisions of this Court, and therefore the petition should not be granted.

2) There is no conflict in the lower courts about the standard to be used. In fact, the standard is developing in a consistent manner.

Petitioner also argues that there is a developing conflict in the lower courts about the standard to be imposed when a lawyer makes a false statement about a judge. In fact, decisions interpreting Model Rule 8.2(a) are consistent.

Model Rule 8.2(a) was originally adopted August 2, 1983. *Annotated Model Rules of Professional Conduct*, p. vii. (American Bar Association, 1996, 3rd Ed.). The seminal case recognizing the objective recklessness standard, as followed in the instant case, was *In Re Graham*, 453 N.W.2d 313 (Minn. 1990), *cert. denied*, 498 U.S. 826 (1990). The *Graham* decision was then explicitly followed in *Matter of Westfall*, 808 S.W. 2nd 829 (Mo. 1991). Thereafter, the Ninth Circuit followed the same reasoning in two separate cases, *U.S. District Court v. Sandlin*, 12 F.3d 861 (9th Cir.1993) and *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

Petitioner has not cited any cases in which Rule 8.2(a) has been interpreted differently. He relies on three cases to show a "conflict," the most recent of which was decided in 1980,

three years before Model Rule 8.2(a) was even adopted. Furthermore, the cases are all readily distinguishable.

In *Eisenberg v. Boardman*, 302 F. Supp. 1360 (W.D. Wis.1969), a Wisconsin federal District Court, in 1969, *upheld* discipline of a lawyer for statements about a judge, construing a different provision than Model Rule 8.2(a).

In *State Bar v. Semaan*, 508 S.W. 2d.429 (Tex.Civ.App. 1974), the court's discussion of First Amendment considerations in a lawyer discipline case are essentially dicta to the holding.

In *Ramirez v. State Bar of California*, 619 P.2d 399 (1980), again in a case *sustaining* discipline in a case not involving Rule 8.2(a), the court discusses First Amendment considerations only in a reverse fashion. In *Ramirez* the court held that cases which *do* involve *New York Times* actual malice *do not* receive First Amendment protection.

These are the only cases cited by Petitioner for his proposition that a conflict is developing in the lower courts. Nothing about any of the cited decisions could be even remotely considered a conflict, nor should they be used to invoke the review of this Court.

Petitioner argues that *Yagman*, cited above, creates an additional conflict. In fact, the 9th Circuit's decision in *Yagman* is entirely consistent with the instant decision and in fact is approved and followed by the Idaho Supreme Court. Petitioner's App. A7. The *Yagman* decision explicitly rules that falsity must be established by the prosecuting authority. As discussed previously, that consideration is uniquely met in this case, due to the manner in which the record was constructed.

Not only are lower court cases not in conflict, they are developing in a coherent and consistent manner. There is certainly no conflict that would require this Court to grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the petition for writ of certiorari and allow the judgment of the Idaho Supreme Court to stand.

Respectfully submitted this 10th day of February, 1997.

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